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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD D. MELTON,) Case No. CV 15-06391 DDP (AGRx)
Plaintiff,)
v.) **ORDER GRANTING DEFENDANT GREEN**
BANK OF AMERICA, N.A.; GREEN) **TREE SERVICING, LLC'S MOTION TO**
TREE SERVICING, LLC;) **DISMISS**
NORTHWEST TRUSTEE SERVICES,) [Dkt. 9]
INC.;,)
Defendants.)

Presently before the court is Defendant Green Tree Servicing, LLC ("Green Tree")'s Motion to Dismiss. Having considered the submissions of the parties, the court grants the motion and adopts the following Order.

I. Background

In 2002, Plaintiff executed a promissory note secured by a Deed of Trust to property located at 1154 N. Sycamore Ave., No. 7, in Los Angeles, California. (Complaint ¶ 1.) In September 2010, the property was foreclosed upon. (Id. ¶ 10.) The foreclosure was rescinded in December 2010. (Id. ¶ 11.)

1 As a result of the foreclosure, Plaintiff's property was
2 reassessed, and his tax liability, and payments to the note holder,
3 increased. (Compl. ¶ 12.) Plaintiff protested to the Los Angeles
4 County Tax Assessor's Office and began withholding payments to the
5 note holder. (Id. ¶¶ 14-15.) The note holder sold Plaintiff's
6 loan and deed to Defendant Green Tree. (Id. ¶ 17.) Green Tree then
7 initiated foreclosure proceedings. (Id. ¶ 18.) Plaintiff alleges
8 causes of action for breach of contract, wrongful foreclosure, and
9 negligence. Green Tree now moves to dismiss.

10 **II. Legal Standard**

11 A complaint will survive a motion to dismiss when it contains
12 "sufficient factual matter, accepted as true, to state a claim to
13 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
14 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
15 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
16 "accept as true all allegations of material fact and must construe
17 those facts in the light most favorable to the plaintiff." Resnick
18 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
19 need not include "detailed factual allegations," it must offer
20 "more than an unadorned, the-defendant-unlawfully-harmed-me
21 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
22 allegations that are no more than a statement of a legal conclusion
23 "are not entitled to the assumption of truth." Id. at 679. In
24 other words, a pleading that merely offers "labels and
25 conclusions," a "formulaic recitation of the elements," or "naked
26 assertions" will not be sufficient to state a claim upon which
27 relief can be granted. Id. at 678 (citations and internal
28 quotation marks omitted).

1 "When there are well-pleaded factual allegations, a court should
2 assume their veracity and then determine whether they plausibly
3 give rise to an entitlement of relief." Id. at 679. Plaintiffs
4 must allege "plausible grounds to infer" that their claims rise
5 "above the speculative level." Twombly, 550 U.S. at 555.
6 "Determining whether a complaint states a plausible claim for
7 relief" is a "context-specific task that requires the reviewing
8 court to draw on its judicial experience and common sense." Iqbal,
9 556 U.S. at 679.

10 **III. Discussion**

11 **A. Breach of Contract**

12 The elements of a breach of contract claim are (1) the
13 existence of a contract, (2) performance or excuse for
14 nonperformance, (3) defendant's breach, and (4) damages. Oasis
15 West Realty, LLC v. Goldman, 51 Cal.4th 811, 821 (2011); See also
16 Rockridge Trust v. Wells Fargo, N.A., 985 F.Supp.2d 1110, 1141
17 (N.D. Cal. 2013). Although the Complaint alleges a breach of the
18 loan contract, Green Tree argues that Plaintiff has not adequately
19 pleaded performance or excuse for nonperformance. Indeed, the
20 Complaint itself alleges that Plaintiff stopped making loan
21 payments in March 2013. (Compl. ¶ 15.) A default was recorded in
22 July 2014. (Green Tree's Request for Judicial Notice, Ex. 2.)

23 Plaintiff's only response is that he is excused from tendering
24 the full amount of the loan "while the tax reassessment issue
25 remains unresolved." (Opposition at 5.) The tender requirement,
26 however, is related to Plaintiff's wrongful foreclosure claim,
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1 discussed below, and not to Plaintiff's breach of contract claim.¹
2 Absent any allegation of performance or excuse for nonperformance,
3 Plaintiff's breach of contract claim against Green Tree is
4 dismissed.

5 B. Wrongful Foreclosure

6 Plaintiff does not dispute that he is required to allege
7 tender of the amount of his indebtedness in order to maintain a
8 cause of action for wrongful foreclosure. See Abdallay v. United
9 Savings Bank, 43 Cal.App.4th 1101, 1109 (1996). Tender may not be
10 required, however, when imposition of the rule would be
11 inequitable. See, e.g., Bok Sil Rah v. Aurora Loan Servs., LLC,
12 No. 12-09166 DDP, 2013 WL 140248 *1 (C.D. Cal. Jan. 10, 2013).

13 Plaintiff contends that such an exception applies here "since
14 Plaintiff is being drastically overcharged due to the unresolved
15 tax reassessment issue." (Opposition at 6.) Green Tree requests
16 that this court take judicial notice of two letters sent by the Los
17 Angeles County Assessor's Office. (Green Tree RJN, Ex. 1.) The
18 first letter, sent in June 2012, acknowledges that the Assessor's
19 ownership records were corrected to reflect Plaintiff's continued
20 ownership. The letter further states, "The reappraisal is being
21 reversed to restore the 2001 value. . . . "[I}f appropriate, new
22 tax . . . refunds will be issued." (Id.) A second letter, sent in
23 December 2012, indicates that the recalculation of Plaintiff's tax
24 liability is in process. (Id.) Although Plaintiff argues that the
25 facts recited in these letters "are disputed by Plaintiff," he
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27 ¹ To the extent Plaintiff intends to argue that the lack of
28 resolution of the tax reassessment issue required him to withhold
payments, that argument is not persuasive, as discussed below.

1 provides no explanation why the accuracy of the calculations or
2 facts therein can reasonably be questioned. See F.R.E. 201(b)(2).²
3 Given the apparent resolution of the tax liability issue, this
4 court cannot conclude that imposition of the tender rule would be
5 inequitable. Plaintiff's wrongful foreclosure claim is, therefore,
6 dismissed, with leave to amend.

7 C. Negligence

8 The elements of a negligence claim are: (1) the existence of a
9 duty to exercise due care, (2) breach of that duty, (3) causation,
10 and (4) damages. Merrill v. Navegar, Inc., 26 Cal.4th 465, 500
11 (2001). The "existence of a duty of care owed by a defendant to a
12 plaintiff is a prerequisite to establishing a claim for
13 negligence." Nymark v. Heart Fed. Savings & Loan Assn., 231
14 Cal.App.3d 1089, 1095 (1991). "[A]s a general rule, a financial
15 institution owes no duty of care to a borrower when the
16 institution's involvement in the loan transaction does not exceed
17 the scope of its conventional role as a mere lender of money."
18 Nymark, 231 Cal. App. 3d at 1096.

19 As Plaintiff correctly points out, the Nymark rule is not
20 absolute. In California, courts employ a six factor test to
21 determine whether a financial institution owes a duty of care to a
22 borrower. The court must consider "[1] the extent to which the
23 transaction was intended to affect the plaintiff, [2] the
24 foreseeability of harm to him, [3] the degree of certainty that the
25 plaintiff suffered injury, [4] the closeness of the connection
26 between the defendant's conduct and the injury suffered, [5] the

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28 ² Plaintiff appears to mistakenly refer to the Federal Rules
of Civil Procedure rather than the Federal Rules of Evidence.

1 moral blame attached to the defendant's conduct, and [6] the policy
2 of preventing future harm." Id. at 1098 (citing Biakanja v.
3 Irving, 49 Ca.2d 647 (1958)). Although Plaintiff recites the
4 Biakanja factors, neither his opposition nor the Complaint sets
5 forth any specific facts necessary to a Biakanja analysis.
6 Plaintiff's negligence claim is, therefore, dismissed.

7 **IV. Conclusion**

8 For the reasons stated above, Green Tree's Motion to Dismiss
9 is GRANTED. All causes of action against Green Tree are DISMISSED,
10 with leave to amend. Any amended complaint shall be filed within
11 fourteen days of the date of this Order.

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14 IT IS SO ORDERED.

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17 Dated: May 16, 2016



DEAN D. PREGERSON
United States District Judge